

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 34

ASPLUNDH TREE EXPERT CO.

Employer¹

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 30

Petitioner

Case Nos. 34-RC-2005
34-RC-2021

SUPPLEMENTAL DECISION AND ORDER

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board (herein called the Board). Pursuant to Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned. Upon the entire record in this proceeding, I find that: the hearing officer's rulings are free from prejudicial error and are affirmed; the Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction; the Petitioner claims to represent certain employees of the Employer; and no question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and 2(7) of the Act.

I. Procedural History

A. Case No. 34-RC-2005

On November 18, 2002, in Case No. 34-RC-2005, the Petitioner sought to represent a unit of full-time and regular part-time employees involved in the trimming of trees along roadsides, including foremen, tree trimmers, ground men, spray foremen, helpers, and permission men (herein called roadside employees) employed by the Employer in its Torrington, Connecticut district. Although

¹ The name of the Employer appears as amended at the hearing.

otherwise in accord as to the scope and composition of the unit, the Employer, contrary to the Petitioner, asserted that: 1) the petitioned-for unit should include certain other employees in the Torrington district known as “off-road” employees; and 2) the petitioned-for unit was not appropriate and that the only appropriate unit consisted of a statewide unit. In support of this latter contention, the Employer maintained, *inter alia*, that beginning on January 1, 2003, it intended to dissolve all five of its districts then-located in Connecticut, including the Torrington district, in favor of a “function”-based structure under which roadside employees could be assigned to work anywhere in Connecticut based on the type of line clearance work their particular crew performed. On December 18, 2002, the undersigned issued a Decision and Direction of Election (herein called DDE) finding that the smallest appropriate unit must include all employees, including off-road employees, assigned to the Torrington district. In reaching this conclusion, the undersigned relied on the “relative insularity” of roadside employees, including “off-road” employees, working in the Torrington district and the single general foreman supervision over these employees. The undersigned further noted that there was insufficient evidence to support the Employer’s contention that a unit limited to the Torrington district was not appropriate because of the imminent implementation of certain changes involving its Connecticut operations. The Employer filed a Request for Review, and on January 8, 2003, the Board granted the Employer’s Request for Review of the DDE and requested that the parties make an evidentiary offer of proof regarding the Employer’s ostensibly new organizational structure effective January 1, 2003, and the impact of that evidence, if any, on the findings in the DDE. On January 28, 2003, the Employer filed an offer of proof with the Board stating that it would present testimony proving that the re-organization resulted in the abandonment of its district-based organization and supervisory structure. In light of this offer of proof, the Board issued an Order on March 13, 2003 remanding this case to the undersigned to reopen the hearing in Case No. 34-RC-2005 in order to take additional evidence regarding the Employer’s re-organization since January 1,

2003, and to issue a supplemental decision regarding the impact of that evidence on the findings in the DDE.

B. Case No. 34-RC-2021

On February 25, 2003, the Union filed a petition in Case No. 34-RC-2021 seeking to represent all roadside employees, except permission men, employed by the Employer in its *Waterbury*, Connecticut district. Although otherwise in accord as to the scope and composition of the unit, the Employer, contrary to the Petitioner, asserted that: 1) the petitioned-for unit should include permission men and quality control inspectors; and 2) because of the changes that were implemented on January 1, 2003, the petitioned-for unit was not appropriate and that the only appropriate unit consisted of a statewide unit of those roadside employees engaged in performing enhanced tree trimming; standard maintenance tree trimming; and capital and miscellaneous tree trimming.

C. The Hearing in Case Nos. 34-RC-2005 and 34-RC-2021

Because both petitions involved the same issue, they were consolidated for hearing by Order dated March 17, 2003. At a hearing held on March 28, 2003, the Petitioner abandoned the “district-based” units it was seeking in both petitions. Instead, it amended both petitions and now seeks to represent approximately 65 roadside employees employed by the Employer in its newly created “E-1,” “E-2,” and “S-1” “cells,” excluding lead foremen, “off-road” employees, permission men, and quality control inspectors. The Petitioner additionally claims that the lead foreman is a supervisor within the meaning of the Act. The Employer, contrary to the Petitioner, asserted that: 1) the petitioned-for unit should include lead foremen, “off-road” employees in the Capital and Miscellaneous tree trimming group, permission men, and quality control inspectors; 2) the lead foreman is not a supervisor within the meaning of the Act; and 3) the petitioned-for unit was not appropriate and the only appropriate unit must be a statewide unit composed of lead foremen, permission men, quality control inspectors, and all “off-road” and roadside employees.

For the reasons noted below, I find that the petitioned-for unit is not appropriate for purposes of collective bargaining, and I shall therefore grant the Employer's motion to dismiss both petitions.

II. Overall Operations

A. Background

As described in the DDE, the Employer provides line clearance tree-trimming services to electric public utility companies nationwide. This entails trimming trees and brush away from overhead power lines to avoid potential power outages. One of the Employer's operating regions, Region 46, covers the entire State of Connecticut and parts of Western Massachusetts and Westchester County, New York. Within the Connecticut portion of Region 46, the Employer has contracted with Connecticut Light & Power (CLP) to provide tree-trimming line clearance service.² Until January 1, 2003, the Employer exclusively provided this service to only 5 of CLP's 10 utility districts located in Connecticut. These five utility districts, known respectively as the Torrington, Waterbury, Cheshire, Hartford/Simsbury, and Tolland/Enfield districts, were contiguous; generally located in the northern half of Connecticut; and encompassed roughly half the state. At the time of the hearing in Case No. 34-RC-2005, several other tree-trimming contractors serviced the five remaining CLP districts. However, effective January 1, 2003, the Employer began exclusively providing statewide coverage to CLP, encompassing all ten of CLP's Connecticut-based utility districts. The record reflects that as a result of this development, effective January 1, 2003, the Employer changed its operations, including its supervisory structure, discussed in greater detail below.

Primarily responsible for the overall operation of Region 46 in Connecticut is Regional Supervisor of Operations-CLP Carl Junghans. Junghans is based in the Employer's regional office in Watertown, Connecticut and is responsible for

² Region 46 also serves as the headquarters for several of the Employer's other divisions that provide tree-trimming services to residential and other commercial customers in Connecticut. Neither the Union nor the Employer seeks to include in the unit any employees from those other divisions, as both agree that a unit limited to the employees who provide services to CLP is appropriate.

overseeing the Employer's CLP operations, including the Employer's labor policies, within Connecticut. All roadside and "off-road" employees in Region 46 share common wages, benefits, hours, and other working conditions, including an OSHA-mandated annual hearing test, and all attend an annual picnic for Region 46 employees. There is no history of collective bargaining regarding any of these employees.

B. Employee Classifications

As described in the DDE, all roadside employees, except permission men, are assigned to a specific crew. Each crew has either two or three employees consisting of a foreman and either a ground man, an operator, or both. Roadside crews typically use a truck equipped with a "bucket" and a wood chipper with which to clear trees and brush alongside the road. However, an unspecified number of roadside crews use a "split dump truck," which does not have a bucket, thus requiring the foreman or operator on such crews to manually climb trees in order to perform trimming work. As described in more detail below, roadside crews also occasionally perform the same trimming duties performed by off-road employees.

Roadside foremen are generally responsible for directing the work of the ground men and operators on their crew, and for ensuring that proper training is ongoing and safety practices followed. They trim trees, drive the truck assigned to the crew, operate other equipment, and spray herbicide on tree stumps to inhibit future growth. Ground men are in effect tree trimmers in training. They primarily flag traffic and feed cut branches and brush into a wood chipper. Operators use ropes to help the foreman lower limbs out of trees, and also perform both tree trimming and ground man duties as necessary.

The Employer also maintains several "off-road" crews who trim trees and brush near high voltage power lines. Such areas veer away from the public road onto private property and right-of-ways and are beyond the reach of the bucket trucks typically used by roadside crews. Each off-road crew has a foreman, along with an operator, a ground man, or both. Off-road employees generally have the same skills and perform the same tree trimming duties as roadside

employees. However, off-road employees also periodically clear and mow areas in order to access trees that must be trimmed. In addition, the off-road crews use pick-up trucks, split dump trucks, or “timberjacks.” The latter is a tractor-like truck with a “bucket” capable of maneuvering over rough terrain. Because most of their work entails trimming areas inaccessible to any type of bucket truck, off-road employees usually must climb trees and are therefore more skilled in this regard than their roadside counterparts.

Off-road crews spend approximately one to two months each year performing roadside duties. Although not entirely clear, it appears that under such circumstances off-road crews either work as an independent roadside crew or are merged into an existing roadside crew to assist with ground man duties. As previously indicated, roadside employees may supplement the off-road crews for about one month per year. In this regard, the record reveals that in 2002, three roadside employees from the Tolland/Enfield district were assigned to an off-road crew for about one month. There is no other evidence of any regular work-related contact between off-road and roadside employees.

Permission men are not assigned to a specific crew. They drive pick-up trucks throughout their assigned district in order to obtain permission from private property owners to trim trees and brush on their property. Once such consent is obtained, permission men convey the written consent forms to their immediate supervisor. Permission men also inform town wardens about the Employer’s trimming operations occurring within that town’s jurisdiction. Prior to January 1, 2003, permission men frequently assisted roadside crews in flagging traffic, retrieving supplies, and training newer employees.

C. The Employer’s “District-Based” Operations Through
 December 31, 2002

Until December 31, 2002, each of the Employer’s then-five districts had a general foreman who reported to Junghans. Roadside employees, including off-road and permission men, were permanently assigned to one of the five districts

and reported directly and exclusively to their district general foreman.³ Each general foreman was responsible for directly coordinating, supervising, training, evaluating, and disciplining all roadside employees assigned to his or her district. The general foreman also conducted a weekly safety-training meeting attended exclusively by that district's roadside employees. Such training sessions were usually held in one of the parking lots located in the respective district. Under this district-based organization, roadside employees were only infrequently assigned to perform roadside duties in one of the Employer's other four Connecticut districts, usually only for a short interval to meet fluctuations in work orders and storm emergencies. For example, during the 19-month period immediately preceding 2003, only six roadside employees from the Torrington district spent about one month working in the Hartford/Simsbury district, and five other roadside employees from the Torrington district worked between one to two days per week over a seven-month period in the Hartford/Simsbury and Waterbury districts. However, whenever roadside employees worked in other than their assigned district, they continued to report exclusively to the general foreman from their "home" district, used their regularly assigned trucks and equipment, and did not have any work-related contact with roadside crews from those other districts. Regarding permanent transfers of roadside employees to or from their assigned district, the record in Case No. 34-RC-2005 revealed only one example of such a transfer, viz., a one-time permanent transfer of nine roadside employees from the Waterbury district into the Torrington district.

D. The Employer's January 1, 2003 Organizational Changes

As noted above, effective January 1, 2003, the Employer began exclusively servicing CLP on a statewide basis. In this regard, Junghans testified that in order to efficiently meet the demands of servicing an area twice the size of its prior area, the Employer implemented several significant operational changes.

³ Through the end of 2002, the Employer maintained a total of 45 roadside crews consisting of 102 employees who were assigned in the following manner: 9 crews with 29 employees in the Torrington district, 12 crews with 21 employees in the Waterbury district; 6 crews with 13 employees in the Cheshire district; 9 crews with 21 employees in the Hartford/Simsbury district; and 9 crews with 18 employees in the Tolland/Enfield district.

First, it dissolved its “district-based” organizational structure in favor of a “function-based” organizational structure. In this regard, the Employer eliminated “district-based” staffing and supervision, including the district general foreman’s position. In its place, the Employer created the following five “function areas,” each of which is overseen by a separate Coordinator, a newly created position under the re-organization, each of whom has overall statewide responsibility for his or her respective group.

Enhanced Tree Trimming (ETT). Employees in this group are responsible for performing trimming around high voltage main feeder circuits located throughout the state. This group is divided into four geographic “cells,” known as “E-1,” “E-2,” “E-3,” and “E-4.” Each of these four cells is overseen by a different “cell” general foreman, all of whom report to the ETT group Coordinator. As noted above, within this group, the Petitioner seeks only to represent those roadside employees assigned to the “E-1” and “E-2” cells.

Standard Maintenance Tree Trimming (SMT). Employees in this group are responsible for performing the scheduled tree trimming conducted every four years on all lateral circuits, which are of lower voltage than main feeder circuits, located throughout the state. This group is divided into three geographic “cells,” known as “S-1,” “S-2,” and “S-3.” Each of these three cells, which geographically overlap the four ETT cells, is overseen by a different “cell” general foreman, all of whom report to the SMT group Coordinator. Within this group, the Petitioner seeks only to represent those roadside employees assigned to the “S-1” cell.

Capital and Miscellaneous Tree Trimming (CPM). Employees in this group are responsible for performing emergency work as well as trimming along areas that have received capital improvements, such as new poles, wires, or extension of existing lines. This group, which is also responsible for performing all off-road work, does not have any cells or general foremen. Rather, the group has about 20 to 45 roadside employees, subdivided into crews of two to three, all of who report directly to the CPM Coordinator. Due to the nature of emergent work and unscheduled off-road work, all roadside employees in the CPM group

are subject to working anywhere in the state. The Petitioner does not seek to represent any employees in this group.

Permission and Planning (PP). This group is composed of permission men who, as noted above, are responsible for securing permits from private landowners to trim trees on their properties. The approximately 20 permission men in this group do not work in any cells or report to any general foremen, but rather report directly to the PP Coordinator and work throughout the state. The Petitioner does not seek to represent any employees in this group.

Quality Control Process (QCP). This group is presently composed of one quality control inspector (with two more to be hired in June 2003) and the QCP Coordinator, both of which are newly-created positions effective January 1, 2003. The quality control inspector is responsible for traveling throughout the state and inspecting the tree work performed by roadside crews to ensure that such work conforms to CLP's specifications. The Petitioner does not seek to represent any employees in this group.

With regard to the four ETT "cells" and the three SMT "cells," the record reveals that the geographical area covered by each cell does not correspond to the geographic area covered by any of the former districts. Rather, each of these seven cells is larger than any of the former districts, and consists of an unstructured geographic area that is constantly contracting and expanding depending upon customer needs. Significantly, individual roadside employees and/or crews in the ETT, SMT, and CPM groups are not permanently assigned to any one of these three groups, nor to a particular cell or general foreman. Rather, as necessary, they are subject to immediate reassignment from their current cell or group to any of the other ETT or SMT cells, or the CPM group. Following such a reassignment, roadside employees report to their new cell's general foreman or, as applicable, to the CPM Coordinator.

The Employer has effectuated such re-assignments of roadside employees since the beginning of 2003. For example, between March 18 and 28, nine employees were re-assigned from the "E-1" ETT cell to the "S-1" SMT cell in order to meet customer demands. In the process, these nine employees

left the supervision of “E-1” General Foreman Tony McAllister and began reporting to “S-1” General Foreman Mike Coffee. In addition, seven crews were transferred from the ETT group (four crews from the “E-2” cell and three crews from the “E-3” cell) into the “S-2” cell in the SMT group. In the process, all of the former ETT employees ceased reporting to their respective ETT general foreman and began exclusively reporting to the general foreman for the “S-2” cell. Thus, following these transfers, four of the nine crews in the “S-2” cell originated in the “E-2” cell. Similarly, five crews were transferred from the ETT group’s “E-4” cell into the SMT group’s “S-3” cell, and a change in immediate supervision for the involved employees immediately followed. With regard to cell-to-cell transfers within the same group, at least one crew was transferred from the “E-3” cell into the “E-4” cell. Another instance of employee movement under the re-organization involved one of the Petitioner’s witnesses, roadside employee Brian Butler, who was transferred in 2003 from the “E-1” cell to the “E-3” cell, and then to the “S-2” cell in the SMT group.

The record also reveals that, as necessary, roadside employees from the ETT and SMT groups periodically perform certain tasks typically assigned to employees in the CPM group, such as off-road and emergency storm work duties.

Since the re-organization, permission men no longer interact with or perform services for roadside crews. More specifically, they no longer assign work to crews, obtain supplies, or perform flagging and training. Instead, they only interact with landowners and their immediate supervisor, the PP Coordinator. Regarding the quality control inspector’s position, there is no evidence that this employee has interaction with any of the roadside employees. Since the re-organization, the Employer has created a new position, lead foreman, who like a crew foreman, is assigned to a particular ETT or SMT crew and performs tree-trimming functions. The lead foreman has authority to discipline crewmembers, particularly for time and attendance related issues, and it appears this position may have supplanted the crew foreman’s former authority to issue similar discipline. However, unlike the crew foreman, the lead foreman

simultaneously oversees about 3 or 4 crews in either ETT or SMT in their immediate vicinity within a cell. The lead foreman also generates certain undefined paperwork relating to the performance of those crews under his or her oversight, hands out paychecks, and appears to have the additional authority of being able to dock a workers' paycheck whenever a roadside employee arrives late or leaves early without permission.

III. Analysis and Conclusion

It is well established that a petitioned-for unit that is less than system-wide is presumptively appropriate for the purposes of collective bargaining where, *inter alia*, the employees in the requested unit work in a distinct geographical subdivision, and enjoy a community of interest sufficient to make separate bargaining a feasible undertaking. *New England Telephone and Telegraph Company*, 249 NLRB 1167 (1980). Specific factors which the Board has considered in determining whether employees in a petitioned-for unit share a community of interest distinct from other employees include differences in compensation, hours of work, benefits, supervision, training and skills; infrequent contact and lack of integration with other employees; and historically separate bargaining units. *Banknote Corp. of America v. NLRB*, 84 F.3d 637, 648 (2nd Cir. 1996), citing *Kalamazoo Paper Box Corp.*, 136 NLRB 134, 137 (1962).

As previously noted herein, based upon the above and the record as a whole, I conclude that the petitioned-for unit composed solely of roadside employees in the Employer's "E-1," "E-2," and "S-1" cells is inappropriate for purposes of collective bargaining. In reaching this conclusion, I note that these three cells do not comprise a distinct geographical subdivision. In this regard, the evidence shows that the Employer does not treat these three cells as a separate and distinct part of its overall operations. Rather, the record demonstrates that roadside employees may be nominally assigned to one of these three cells, but are subject to immediate re-assignment to any of the remaining ETT or SMT cells. Indeed, as noted above, the evidence demonstrates that in 2003, the Employer staffed over 40% of its roadside crews in the "S-2" cell with employees transferred in from the "E-1" cell. Moreover,

roadside employees in all other cells and groups share a distinct community of interest with roadside employees in the three petitioned-for cells based on their common skills, wages, benefits, working conditions, other terms and conditions of employment, and common immediate supervision while working in the same cell.

Accordingly, I find that the petitioned-for unit is inappropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. Although the Petitioner was afforded an opportunity to express whether it would proceed to an election in an alternative unit, the Petitioner specifically declined to do so.⁴ Therefore, in view of the changed circumstances since January 1, 2003, and noting further that the Petitioner has abandoned its position taken in Case No. 34-RC-2005, I shall vacate my DDE in this matter, and dismiss the petitions herein.

ORDER

IT IS HEREBY ORDERED that the petitions filed in this matter are dismissed.

Right to Request Review

Upon the provisions of section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by June 27, 2003.

Dated at Hartford, Connecticut, this 13th day of June, 2003.

/s/ Peter B. Hoffman
Peter B. Hoffman, Regional Director
National Labor Relations Board, Region 34

420-2903, 2915, 2921, 2927, 2933, 2957, 2963, 4008, 4025, 4087, 5027, 7330, 8412, 8417.

⁴ In view of my determination that the petitioned-for unit is inappropriate, it is unnecessary to decide the unit placement and supervisory issues relating to lead foremen, permission men, "off-road" employees in the CPM group, and quality control inspectors.